

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Daniel Giansante	Team: Squad #2	CCRB Case #: 201502939	<input checked="" type="checkbox"/> Force	<input checked="" type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Thursday, 04/02/2015 1:00 PM	Location of Incident: 2978 Cropsey Avenue	Precinct: 60	18 Mo. SOL 10/2/2016	EO SOL 10/2/2016	
Date/Time CV Reported Thu, 04/02/2015 8:00 PM	CV Reported At: IAB	How CV Reported: Phone	Date/Time Received at CCRB Fri, 04/17/2015 11:36 AM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Mark Desimone	00281	923755	CTERRDV

Officer(s)	Allegation	Investigator Recommendation
A.POM Mark Desimone	Discourtesy: PO Mark Desimone spoke rudely to § 87(2)(b) [REDACTED]	
B.POM Mark Desimone	Force: PO Mark Desimone used physical force against § 87(2)(b) [REDACTED]	
C.POM Mark Desimone	Abuse: PO Mark Desimone threatened to arrest § 87(2)(b) [REDACTED]	

### Case Summary

On April 2, 2015, at approximately 1 p.m., PO Mark Desimone, then assigned to the Counterterrorism Division, drove his personal vehicle during his lunch break to a BP gas station located at 2978 Cropsey Avenue in Brooklyn. PO Desimone was not in uniform. The station is full-service but PO Desimone attempted to pump his own gas, and he eventually became engaged in a dispute with the station attendant, § 87(2)(b). PO Desimone used the word “fuck” when he told § 87(2)(b) to get away from him (**Allegation A**). PO Desimone also pushed § 87(2)(b) in the chest (**Allegation B**). PO Desimone eventually displayed his shield and identification, identified himself as a police officer, and threatened to arrest § 87(2)(b) (**Allegation C**). A surveillance camera at the gas station captured a portion of the interaction between PO Desimone and § 87(2)(b) (BR01; BR02).

### Mediation, Civil and Criminal Histories

- This case was ineligible for mediation because of a concurrent and ongoing investigation conducted by Brooklyn South Investigations.
- On July 27, 2015, the NYC Comptroller’s office confirmed that § 87(2)(b) has not filed a Notice of Claim regarding the incident (BR03).
- [§ 87(2)(b)] [§§ 86(1)(3)&(4)] [§ 87(2)(c)]

### Civilian and Officer CCRB Histories

- This is § 87(2)(b)’s first CCRB complaint (BR05).
- PO Desimone has been a member of the NYPD for 16 years and has had 14 previous CCRB allegations involving six cases, with two substantiated allegations (see officer history). PO Desimone also has one open CCRB allegation stemming from a complaint filed after this incident.
  - In CCRB case #200400081, the Board substantiated allegations of vehicle search and discourtesy and recommended charges. The charges were dismissed at a departmental trial.

### Civilian Statement

#### Complainant/Victim: § 87(2)(b)

§ 87(2)(b) called 911 shortly after the incident and reported that a customer cursed at him, pushed him, identified himself as a police officer, and threatened to arrest him (BR06; BR07).

§ 87(2)(b) provided a telephone statement on April 22, 2015, and was interviewed in-person on April 28, 2015 (BR08; BR09). A Turkish interpreter was used during both interviews, though § 87(2)(b) frequently spoke in English.

§ 87(2)(b) is an attendant at the gas station, which is a full-service station. He was assisting a customer when he saw PO Desimone pumping his own gas at another pump. Because the station is full-service, anyone can access a pump and leave without paying for the gas. § 87(2)(b) approached PO Desimone and told him multiple times in English that the station was full-service and that he should not be pumping gas. He also asked PO Desimone if he would be paying with cash or a credit card. PO Desimone ignored § 87(2)(b) before yelling, “Get the fuck out of here now!” § 87(2)(b) looked at the pump kiosk, which indicated to him that PO Desimone was making a cash purchase, and told PO Desimone that he could leave him alone if he was going to pay with a credit card. § 87(2)(b) entered the gas station to check the computer and confirmed

that PO Desimone was using a credit card. § 87(2)(b) believed that the kiosk indicated PO Desimone was paying cash because PO Desimone must have used a BP discount card. § 87(2)(b) approached PO Desimone again and said, “You are using credit card.” PO Desimone became angry and again said, “Get the fuck out of here.” PO Desimone got in § 87(2)(b)’s face and chest-bumped him, which knocked § 87(2)(b) off balance and caused him to take two steps backward. § 87(2)(b) had not touched PO Desimone. He denied ever raising his voice or using profanity with PO Desimone.

§ 87(2)(b) also recounted that PO Desimone quickly opened and closed an ID, said he was a police officer, and twice asked § 87(2)(b) “You want me to arrest you right now?” § 87(2)(b) could not recall if PO Desimone identified himself as an officer before or after he chest-bumped him. He did not believe PO Desimone was an officer and stated this belief when he called 911.

§ 87(2)(b)’s telephone statement differed slightly from his in-person interview. In his telephone statement, he alleged that PO Desimone first flashed his identification, then said, “Get the fuck out of here, motherfucker. I’ll arrest you,” and finally chest-bumped him.

### **NYPD Statement**

#### **Subject Officer: PO MARK DESIMONE**

PO Desimone provided a statement to Brooklyn South Investigations officers on the date of the incident. As that investigation is still pending, the CCRB investigation could not obtain a recording of the interview. However, PO Desimone’s statement was summarized in a UF49 report prepared by Capt. Daniel Magee of the 60<sup>th</sup> Precinct (BR10). PO Desimone recounted that he pulled up to the gas pump and saw § 87(2)(b) approach his vehicle and opened his gas cap cover, which made him think it might have been a full-service pump. However, § 87(2)(b) was not wearing anything to identify himself as an employee. PO Desimone did not know if § 87(2)(b) was an employee and thought he may have been trying to “scam” a tip by pumping customers’ gas. PO Desimone never asked § 87(2)(b) if he was an employee of the gas station. PO Desimone told § 87(2)(b) that he would pump his own gas and used his discount card and credit card in the kiosk. § 87(2)(b) yelled, “You’re doing it wrong! These are cash prices!” § 87(2)(b) became angry and asked to see PO Desimone’s card. PO Desimone admitted to telling § 87(2)(b) “Leave me the F- alone.” § 87(2)(b) was invading PO Desimone’s personal space and PO Desimone felt threatened by § 87(2)(b)’s aggressive demeanor. When § 87(2)(b) continued to approach aggressively, PO Desimone extended his arm and told him to back away. § 87(2)(b) came toward PO Desimone a second time, placed both his hands on PO Desimone’s chest, and shoved him. PO Desimone extended his arm again and pushed § 87(2)(b) away. He displayed his shield and identification and said, “I’m a police officer.” § 87(2)(b) said he would call the police and told PO Desimone to get the fuck off his property. PO Desimone drove away.

PO Desimone was interviewed at the CCRB on June 5, 2015 (BR11). He claimed that he did not notice if the station was full-service or self-service, and that § 87(2)(b) was wearing a gray sweatshirt and jeans and did not have any apparel that identified him as an employee. § 87(2)(b) never identified himself as an employee during the incident and never told him the station was full-service. The station had a lower price per gallon for customers who paid with cash than for those who used a credit card. PO Desimone used his credit card and a rewards card, which gave him a price close to the station’s cash price. § 87(2)(b) stood and watched PO Desimone interact with the kiosk, which PO Desimone thought was strange and which made him uncomfortable. PO Desimone began pumping gas and § 87(2)(b) inspected the kiosk. § 87(2)(b) asked, “How did you get that price? What are you doing? What did you do to my pump?” PO Desimone asked § 87(2)(b)

§ 87(2)(b) who he was and § 87(2)(b) became more angry and aggressive. He said, “No, no, no, my friend, how did you get that price?” PO Desimone again asked him who he was and § 87(2)(b) yelled, “How the fuck did you get this price? What did you do to my pump? You’re stealing from me! You’re stealing!” § 87(2)(b) spoke with an accent but PO Desimone could generally understand him.

§ 87(2)(b) approached PO Desimone and stood with the pump hose between him and the officer. PO Desimone continued to pump gas and § 87(2)(b) yelled, “How’d you get that price? You’re stealing from me! You’re stealing!” PO Desimone again denied that he was stealing, asked § 87(2)(b) who he was, and told him to go away. § 87(2)(b) edged closer and yelled, “Fuck you! You’re stealing! Fuck you! Show me the fucking card!” PO Desimone told § 87(2)(b) to go away again. At some point he told § 87(2)(b) that he was using a rewards card. § 87(2)(b) demanded to see it and PO Desimone said he did not have to show § 87(2)(b) anything. PO Desimone admitted that he used profanity “maybe one time” and quoted himself as saying, “Go the fuck away,” and “Get the fuck away from me, guy. Please leave me alone.” He did not recall using the word “motherfucker.” PO Desimone used profanity as the minimum amount of force he could employ but admitted that it was not “the greatest tactic in the world.” § 87(2)(b) came within a foot of PO Desimone and got in his face. § 87(2)(b) looked like he was going to touch PO Desimone, so PO Desimone extended one arm while still pumping gas and said, “Get away from me. Stop.” His hand touched § 87(2)(b)’s chest. § 87(2)(b) extended both hands and pushed PO Desimone in the chest. Neither man’s push was “very hard” and neither of them was knocked off balance.

PO Desimone felt physically threatened by § 87(2)(b). He decided to identify himself as an officer in an attempt to deescalate the situation. He showed his shield and identification and said, “Don’t touch me again. I’m a police officer. If you touch me again, I’m gonna arrest you.” PO Desimone said he would have arrested § 87(2)(b) for disorderly conduct or possibly harassment, but specified that he was not threatening § 87(2)(b) so much as explaining what would happen if his behavior did not change, and that he made the threat because § 87(2)(b) made physical contact with him. PO Desimone was unsure if harassment was a correct charge, because while officers cannot be the victims of harassment, he was not acting in the scope of his duties at the time. He said § 87(2)(b) violated the subsections of the disorderly conduct statute regarding the use of foul and abusive language and the causing of public alarm. There were no other customers outside at the station at the time of the incident, no one stopped to watch the incident, and a crowd did not gather.

When PO Desimone identified himself as an officer, § 87(2)(b) responded, “Fuck you. That’s a fake badge. You’re a fake cop. Fuck you.” He began photographing PO Desimone’s license plate and said he was going to call the police. PO Desimone said that was fine and finished pumping his gas. § 87(2)(b) yelled, “Get the fuck off of my gas station! Get the fuck off of my property! Get the fuck out of here! Don’t ever fucking come back!” PO Desimone began to think that § 87(2)(b) might work at the gas station. PO Desimone purposely walked around the front of his vehicle to avoid any further confrontation with § 87(2)(b) and did not have any physical contact with him after he identified himself as a police officer. He denied ever leaving the area directly next to the pump.

PO Desimone viewed the video footage of the incident. The investigator called his attention to the moment when he and § 87(2)(b) emerge from behind the pump. PO Desimone confirmed that moment depicted what he previously described as the time he stuck out his arm and put his hand on § 87(2)(b)’s chest. He said, “I’m afraid this refreshed my recollection a little bit. When

he came at me, yeah, I pushed. Like when we came out here, I was like, ‘Get away from me! Get away from me!’ That’s why we came out here.” PO Desimone apologized for not recalling that he and § 87(2)(b) moved away from the pump during the incident.

### **Video Footage**

The investigation obtained a short video clip taken from a gas station surveillance camera (BR01). The footage was filmed from the screen of the station’s surveillance system with the cellphone of one of the officers involved in the investigation conducted by Brooklyn South Investigations. The footage begins after § 87(2)(b) and PO Desimone are already speaking to one another. They are hidden from view by the pump kiosk, though the top of PO Desimone’s head is visible. The pump hose can be seen moving and § 87(2)(b)’s right shoulder briefly sticks out from behind the kiosk. At 00:43, PO Desimone suddenly shoves § 87(2)(b) into view from behind the kiosk. PO Desimone pushes § 87(2)(b) with both hands and § 87(2)(b) takes a few steps backward. PO Desimone continues advancing on him and sticks a pointed finger in his face. § 87(2)(b) takes another step backward as PO Desimone speaks to him. PO Desimone turns and walks back to the kiosk. § 87(2)(b) follows PO Desimone while holding up a finger and appearing to speak to him. He takes out his cellphone and photographs the rear of PO Desimone’s vehicle. At 01:10, PO Desimone comes back into view from behind the kiosk and approaches § 87(2)(b) with his arms stretched out at his sides. He gets in § 87(2)(b)’s face and says something. § 87(2)(b) begins walking to his right, away from PO Desimone’s vehicle. PO Desimone turns to walk back to the pump, but as he does so he shoves § 87(2)(b) with his right hip. § 87(2)(b) looks at his phone for a few seconds before turning back to the kiosk. He appears to speak to PO Desimone again. At 01:57, PO Desimone begins to walk away around the rear of his vehicle, but turns back with his arms out to his sides and speaks to § 87(2)(b) again. At 2:09, PO Desimone enters his vehicle and drives away.

### **Findings and Recommendations**

#### **Explanation of Subject Officer Identification**

- PO Desimone admitted to using profanity with § 87(2)(b) to pushing him, and to threatening to arrest him. § 87(2)(g)

#### **Recommendations**

- **Allegation A—Discourtesy: PO Mark Desimone spoke rudely to § 87(2)(b)**  
**Allegation B—Force: PO Mark Desimone used physical force against § 87(2)(b)**

It is undisputed that PO Desimone was on duty during the incident. It is further undisputed that PO Desimone used profanity with § 87(2)(b) during the incident and pushed him in the chest. PO Desimone admitted that he used the word “fuck” when he told § 87(2)(b) to get away from him. He said he used profanity because § 87(2)(b) was aggressive, came too close to him, and refused to back away. He described the use of profanity as the minimum amount of force he would employ. In his phone statement, § 87(2)(b) also alleged that PO Desimone used the word “motherfucker” when he ordered him to get away. § 87(2)(b) did not repeat this allegation during his in-person interview. PO Desimone did not recall using the word “motherfucker” during the incident.

§ 87(2)(g)

Photographs of the location show that the only signs indicating that the station is full-service are mounted directly above the pump kiosks (BR12-BR17). The back of one of these signs is visible in the video footage and PO Desimone stood below it during the incident. However, the sign is mounted well above eye level. The UF49 report indicates that PO Desimone admitted that he thought he may have stopped at a full-service pump when § 87(2)(b) first approached his vehicle, but that he concluded that § 87(2)(b) was not an employee. § 87(2)(g)

§ 87(2)(b) In his CCRB interview, PO Desimone initially attempted to downplay his use of force against § 87(2)(b) by claiming that he merely extended his arm and touched § 87(2)(b)'s chest. However, the footage shows that PO Desimone pushed § 87(2)(b) with both hands and moved him a considerable distance away from the pump. It must also be noted that PO Desimone is five inches taller and nearly forty pounds heavier than § 87(2)(b). PO Desimone also claimed that he purposely walked around the front of his vehicle to avoid any further confrontation with § 87(2)(b). The footage shows that PO Desimone continued to advance upon § 87(2)(b) after pushing him, got in his face again when § 87(2)(b) attempted to photograph his license plate, shoved him a second time with his hip, and approached him again to continue the argument before finally returning to his vehicle. § 87(2)(g)

Patrol Guide Procedure 203-09 requires that officers be courteous and respectful when interacting with members of the public (BR18). The use of profanity is generally not condoned by the Department, but there are recognized instances when its use is not considered actionable misconduct. Such an instance can include an interaction in which an officer uses an expletive in a verbal command to gain cooperation in lieu of using physical force. P.D. v. White, OATH Index 78667/03 (2004) (BR19).

§ 87(2)(g)

• **Allegation C—Abuse of Authority: PO Mark Desimone threatened to arrest § 87(2)(b)**  
§ 87(2)(b)

As previously discussed, it is undisputed that PO Desimone threatened to arrest § 87(2)(b). PO Desimone said he told § 87(2)(b) “Don’t touch me again. I’m a police officer. If you touch me again, I’m gonna arrest you.” PO Desimone clarified that he was not threatening § 87(2)(b) so much as explaining what would happen if he did not change his behavior, and said he made the threat because § 87(2)(b) made physical contact with him. In his CCRB interview, PO Desimone said he would have arrested § 87(2)(b) for violating the disorderly conduct statutes regarding foul and abusive language and causing public alarm. He thought § 87(2)(b) might also have committed harassment but was unsure, because while officers technically cannot be the victims of harassment, PO Desimone was not acting within the scope of his duties at the time. The video footage does not show any pedestrians, motorists, or other gas station customers congregating or watching § 87(2)(b) and PO Desimone’s dispute, and PO Desimone admitted as much in his CCRB interview.

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof: 1.) He engages in fighting or in violent, tumultuous or threatening behavior; or 2.) He makes unreasonable noise; or 3.) In a public place, he uses abusive or obscene language, or makes an obscene gesture; or 4.) Without lawful authority, he disturbs any lawful assembly or meeting of persons; or 5.) He obstructs vehicular or pedestrian traffic; or 6.) He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or 7.) He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose. NYS Penal Law § 240.20 (BR20). A person is guilty of harassment in the second degree when, with intent to harass, annoy, or alarm another person: 1.) He strikes, shoves, kicks, or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; 2.) He follows a person in or about a public place or places; or 3.) He engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose. NYS Penal Law § 240.26 (BR21).

§ 87(2)(g)

Pod: 2

Investigator: \_\_\_\_\_ Daniel Giansante \_\_\_\_\_  
Signature Print Date

Pod Leader: \_\_\_\_\_

	Title/Signature	Print	Date
Attorney:	_____	_____	_____
	Title/Signature	Print	Date